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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KATHLEEN MARGARET LADD, Defendant and Appellant.	H034371 (Santa Clara County Super.Ct.Nos. CC762505, BB407727)

This is the fifth appeal in a series involving two separate criminal convictions. While on probation in both cases, defendant Kathleen Margaret Ladd requested the trial court by motion to determine her ability to pay certain fines and fees that had previously been imposed. The trial court deferred that determination, the subject of another appeal, but then 13 months later concluded that Ladd's probation supervision fees should be reduced and found that she had the ability to pay $25 per month on each case. After that order, the subject of another appeal that is still pending,[1] Ladd sought to suspend her obligation to pay monthly fees until such time as she could become gainfully employed and thereby earn sufficient discretionary income to pay the fees.

[1] On Ladd's motion, we have by separate orders already taken judicial notice of our prior case of *People v. Ladd* (Apr. 15, 2008, H031838) [nonpub. opn.] and *People v. Ladd* (H033813, appeal pending), in which the record has been prepared but briefing has been stayed. In addition, on our own motion, we also take judicial notice of *People v. Ladd* (Aug. 4, 2005, H028191) [nonpub. opn.] and *People v. Ladd* (Apr. 1, 2010, H032456) [nonpub opn.].

The trial court denied that request, and, without notice and over objection, granted the People's oral request at the hearing to extend Ladd's term of probation by two years, ostensibly because at the ordered rate of payment, she would still owe fines and fees one year later—the end of her initially imposed three-year probation term. In the instant appeal, Ladd challenges the order extending her probation term. Concluding that the court did not comply with applicable statutory requirements concerning the modification of probation, we reverse.

STATEMENT OF THE CASE[2]

I. *Case Number BB407727*

In 2004, Ladd was convicted by no-contest plea of petty theft with a prior and battery in Santa Clara County Superior Court case number BB407727. At sentencing on September 23, 2004, the trial court, among other things, suspended sentence and placed Ladd on formal probation for three years, ordered her to serve a six-month jail term, and imposed a $200 restitution fund fine plus what the court called a "10 percent penalty assessment." Ladd was permitted to serve her jail term on the electric monitoring program as authorized by Penal Code section 1203.016[3] beginning in November 2004 with verification of her medical records and to "pay all fees associated with that program."[4] She was referred to the "Department of Revenue for her ability to pay fines and fees." Her counsel asked if fees for the electronic monitoring program would be based on ability to pay and the court confirmed that this was the case. Ladd was initially

[2] We dispense with the underlying facts of Ladd's crimes as they are not relevant to this appeal.

[3] Further statutory references are to the Penal Code unless otherwise stated.

[4] It appears that electronic monitoring was permitted for medical reasons. In March 2005, probation terms were modified such that Ladd was permitted to serve her remaining jail term by substituting community service in place of the electronic monitoring program. This was also for medical reasons.

ordered to begin the electronic monitoring by November 24, 2004, but that date was extended to November 30, 2004. When being physically hooked up to the electronic monitoring system, Ladd was requested to sign a form agreeing to pay $20 per day for each day she participated in the program with a deposit of $70.[5] According to Ladd, she was told that if she did not sign the form, she would not then be hooked up to the program, would consequently miss her compliance date, would not be allowed to participate in the program, and would be required to serve jail time instead. She asked for a delay to speak with her lawyer about the form but was told that if she delayed, it would preclude her participation in the program. She accordingly signed the form agreeing to pay.

On appeal from the judgment of conviction and sentencing, Ladd challenged the so-called penalty assessment on the restitution fund fine as unauthorized. Concluding that the 10 percent fee imposed on top of the fine was intended to be a permissible administrative fee under section 1202.4, subdivision (*l*) and not an impermissible penalty assessment, we rejected Ladd's claim and affirmed. (*People v. Ladd* (Aug. 4, 2005, H028191) [nonpub. opn.].) Ladd did not raise any other issues in that appeal.

II. *Case Number CC762505*

In 2007, while still on probation in the prior case, Ladd was convicted by no-contest plea in Santa Clara County Superior Court case number CC762505 of buying, receiving, concealing, or withholding stolen property. She also admitted having committed the offense while she was out of custody and out on bail on a separate felony charge of possession of a controlled substance. On June 8, 2007, under a negotiated

[5] The form provides for a repayment rate of $5.00 per day *while* Ladd was an active participant of the program and it acknowledges that the "repayment rate is based on [the probationer's] ability to pay" and that the person "cannot be denied consideration for or removed from participation in the [program] because of an inability to pay," which is consistent with section 1208.2, subdivision (g).

disposition, the trial court suspended imposition of sentence and placed Ladd on formal probation for three years, and, without objection, reinstated and modified probation in case number BB407727 by extending it to be "coterminous" with probation in case number CC762505. The separate possession-of-a-controlled-substance charge was referred to a different court for sentencing. Conditions of probation in case number CC762505 included a six-month jail term with credit for time served, substance abuse counseling, and payment of restitution.[6] The trial court also imposed various fines and fees, including a $129.75 criminal justice administration or booking fee under Government Code section 29550.1, a presentence investigation fee "not to exceed $450 and probation supervision fees not to exceed $64 per month," both these latter fees under section 1203.1b.

At the change of plea hearing, the court informed Ladd that she would be required to prepare a statement-of-assets form, which she was provided with, and at sentencing, she was referred to the "Department of Revenue for determination of her ability to pay fines and fees." In response to this referral, Ladd's counsel requested a court hearing to determine her ability to pay "fines, fees, and restitution" and the court reiterated its reference to the Department of Revenue for this determination with the proviso that Ladd could later request a hearing after the Department made its findings. Ladd's counsel made the point that her oral request for a hearing was for the record as "sometimes those fees are a bit on the exorbitant side."

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[6] Ladd apparently was released from jail on August 4, 2007, after serving 123 days. On July 21, 2008, the probation department "banked" her case, meaning that she no longer had to actively report to probation but was still subject to administrative monitoring. Thus, according to Ladd, her time on active probation during which she required services was 11 months and 17 days. During that time, she met with her probation officer on approximately six occasions for approximately 10 minutes each time and she submitted approximately seven urine tests.

Ladd appealed based on the sentence or other matters occurring after the plea in a case filed under *People v. Wende* (1979) 25 Cal.3d 436. We concluded that there were no arguable issues on appeal and affirmed. (*People v. Ladd* (Apr. 15, 2008, H031838) [nonpub. opn.].)

III. *Appeal Number H032456*

On September 28, 2007, three months after sentencing, Ladd filed a motion in case number CC762505 for the court to determine her ability to pay fines, fees, and costs. The motion contended that because Ladd was a full-time student at San Jose State University in her senior year and because she was not employed and would not possibly be employed until after her graduation from college in May 2008, she had no ability to pay fines and fees in that case that she contended were subject to ability to pay—the $129.75 criminal justice administration (booking) fee, and the $450 pre-sentence investigation fee and $64 per month probation supervision fee, both under section 1203.1b. Ladd further contended that the Department of Revenue had not in fact determined her ability to pay fines and fees but had instead merely billed her for the maximum amount of each of the fees, even though the court had ordered her to pay a pre-sentence investigation fee "not to exceed" $450 and monthly probation supervision fees "not to exceed" $64.

Ladd's motion included a declaration by her counsel describing counsel's efforts to obtain a Department of Revenue determination of Ladd's ability to pay. This declaration contained evidence to the effect that the Department of Revenue will not reduce fines and fees for inability to pay except in four specified circumstances, none of which applied to Ladd: "1) if the defendant receives SSI as his or her only income; [¶] 2) if the defendant receives AFDC and does not have other income; [¶] 3) if the defendant is disabled and receives only funds from disability; or, [¶] 4) if the defendant is terminally ill and can produce medical documentation to that effect." Ladd also submitted a Statement of Assets showing that she had no earnings or assets and that her only source

of income was from her mother.[7] The Statement included as a debt $2,160 still owed in case number BB407727 but this amount was not challenged by the motion.

The motion was heard on December 19, 2007. Ladd had subpoenaed three people from or representing the Department of Revenue, who were present. The People pointed out that the fees owing in the case were just over $3,000 and that Ladd had been billed by the Department of Revenue to pay that amount in monthly installments of $103. The parties agreed that at the time of the hearing, Ladd was a student, was impecunious, and had no ability to pay the challenged fines and fees. But the People represented that the Department was insisting on full payment because Ladd would "have earnings in the future."

The court ultimately expressed its view that because Ladd was receiving the benefit of probation services and would later be in a position to be employed, the fees should not be forgiven but that it was premature to determine her ability to pay them. The court stayed the probation-related fees[8] (without accrual of interest) and deferred a determination of Ladd's ability to pay until January 2009, just over one year from the hearing. The court analogized the obligations to student loans, which are held in

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[7] Ladd's counsel in that hearing was her mother, who, it appears, owned the car Ladd drove, which was her only claimed property in her Statement of Assets, and otherwise financially supported her.

[8] It appears that the deferral did not include the $129.75 criminal justice administration (booking) fee. We say this because this fee is not a probation-related fee as the court specifically referenced the fees to be stayed and because we cannot identify this fee in the later itemization of fines and fees in case number CC762505 provided by the Department of Revenue. Ladd has acknowledged in briefing that at least one bill from the Department of Revenue in 2007 did not include this charge. This omission is consistent with our conclusion in appeal H032456, the opinion in which is also filed this date, that Ladd owed the booking fee to the City of Santa Clara, whose officers had arrested her, and not the County. Government Code section 29550.1 thus applies and it, unlike its counterpart section 29550.2, does not make the fee subject to ability to pay.

abeyance until the student graduates and presumably becomes employed. The court also requested the probation department to do "an analysis of their monthly fees" based on whether or not Ladd was receiving a full panoply of probation services and to adjust the monthly $64 charge if probation were to be terminated or "banked."[9] And it added that if in January 2009, Ladd were still indigent, the obligations might again be deferred.

One of the people who had appeared from the Department of Revenue volunteered to the court that although it was not the subject of Ladd's motion, she had requested of the Department that fees owed for electronic monitoring in case number BB407727 be "deleted" based on her inability to pay and that the Department did not object if the court were to also consider these fees "held" until after Ladd graduated from college. The court accordingly included those fees among the others being stayed pending Ladd's graduation.

Ladd timely appealed the court's order deferring a determination of her ability to pay. We concluded in an opinion filed this date that although the court had erred under section 1203.1b by deferring the ability-to-pay determination of probation-related fees, the error was not prejudicial because the court was free to later revisit the issue, as it did 13 months later by making a determination. We further concluded that the booking fee was not subject to ability to pay under Government Code section 29550.1 because Ladd had been arrested by City of Santa Clara police officers, that she was not aggrieved by the court's order staying her obligation to pay electronic monitoring fees from the prior

[9] The court said that if probation were terminated, then there shouldn't be fees accruing after that and if her probation were "banked," meaning placed off of active reporting status, the fees could be reduced. But the full probation cost of $64 per month, which was asserted to be the average actual cost, should continue to be charged if Ladd were being "actively supervised on a weekly basis and [if there were] regular activity with full service being rendered." Accordingly, the court requested the probation department to "evaluate the sliding scale up to $64 depending on the type of service they actually render."

case, and that even if she were, she had not triggered the court's obligation to make an ability-to-pay determination under section 1208.2, subdivision (h).

IV. *Appeal Number H033813*[10]

In the month before the deferred hearing date to determine Ladd's ability to pay, on December 7, 2008, the Department of Revenue billed her $3,064 in case number CC762505 and $2,160 in case number BB407727, representing outstanding fees and fines due in each case. On January 13, 2009, the Department sent Ladd a notice of referral to probation officer that demanded payment within 15 days, of the $2,160 owed in case number BB407727 on pain of arrest. In January 2009, Ladd submitted an updated financial form[11] to the Department of Revenue and the Department conducted an evaluation of her ability to pay. Ladd later filed court papers for the deferred hearing that month. Her papers contended that she still lacked the ability to pay fines and fees. They outlined how Ladd had graduated cum laude from college in May 2008 with a major in forensic psychology but, despite applying to 57 separate businesses in the legal field, she had been unable to find employment due to her criminal record and the economic climate. She was doing volunteer work and had earnings in 2008 of $3,360 and student loan obligations of $13,624.99, payable at $153.32 per month. She had also suffered continuing health problems in September 2008 for which she was hospitalized and needed to maintain her health coverage at $424 per month. Even with health coverage, she faced outstanding medical bills related to her hospitalization in the approximate

[10] On Ladd's request, we stayed briefing in appeal number H033813 pending resolution of the prior appeal, case number H032456, filed this date.

[11] The form showed that Ladd was unemployed, had monthly income of $293 for "odd jobs," and monthly expenses of $3,226.43, composed of $1,250 (rent), $264.49 (car expenses, $153 (student loans), $402.50 (medical insurance), $880.19 ("groceries/ utilities/household/etc.," and $276.25 (miscellaneous medical costs).

amount of $1,100. An updated Statement of Assets form reflected gross pay of $293 per month, monthly expenses of $3,162.32,[12] and Ladd's mother as her source of income.

The deferred hearing to evaluate Ladd's ability to pay took place on January 26, 2009. Representatives from the Department of Revenue had again been subpoenaed and were on hand to testify. They informed the court that they had done a recent evaluation of Ladd's ability to pay and concluded that she could pay $25 per month in each case based on Ladd performing odd jobs as stated in her financial form and on her future earning capacity, with payments to begin in 90 days.[13] But the Department did not reduce or eliminate the $450 charge for the pre-sentence investigation report or the $64 per month probation supervision fee, charged for a period of 36 months, in accordance with its internal written ability-to-pay policies. These policies included not ever eliminating a fee or applying a sliding scale on the sole basis that a probationer was a student and because of that, did not have the ability to pay.[14] This policy was

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[12] This amount was itemized at $1,250 for rent; $630 for food and household supplies; $150 for utilities and telephone; $40 for laundry and cleaning; $250 for medical and dental payments; $424 for insurance premiums; and $ 265 for transportation and auto expenses.

[13] The Department offered that in case number BB407727, the balance owing remained $2,160 and that over time, Ladd had paid $790 toward the original balance of $2,950. Ladd contended that the $790 paid was to be credited to fines and fees other than for electronic monitoring so that the remaining balance represented only that. But the Department asserted, and the court agreed, that a probationer cannot dictate application of payments and that they are applied according to a state formula so that the balance owed represented a combination of fines and fees, including for electronic monitoring. The Department further confirmed that in case number CC762505, the original amount of $3,064 was still owed with no payments having been credited. Again, we do not see a $129.75 criminal justice administration fee in that total, which is consistent with that fee being owed to the City of Santa Clara under Government Code section 29550.1 rather than to the County under section 29550.2.

[14] The Department's written policy was later admitted into evidence, along with statements of account for each of Ladd's two cases and the Department's sliding scale for probation costs. The written policy confirmed that there were only four circumstances in

implemented on the theory that such a person would have future income. Accordingly, the Department offered its assessment of Ladd's ability to pay by recommending, in accordance with its policies, that no costs be reduced but that she be ordered to pay costs at the rate of $50 per month, $25 for each case.

Before taking testimony, the court pointed out with regard to the electronic monitoring fees in case number BB407727, that Ladd had had the benefit of this program as an alternative to jail time as a matter of leniency, and that if a defendant accepts the program, then he or she must pay for it. Ladd asserted that she did not have the ability to pay for it and the court responded that Ladd's position was more akin to a "refusal to pay when you have the ability to pay in installment payments." The court expressed its acceptance of the Department's administrative finding that Ladd could pay $25 per month toward this obligation and informed Ladd that the burden was on her to demonstrate her inability to pay.[15]

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which the Department would waive fees—when the defendant is proven to be indigent *and* "is either on welfare, terminally ill, permanently disabled (SSI) or mentally incapacitated." The policy specifically provided that "[d]efendants who are students, unemployed or employed earning minimum wage are not eligible for a fee waiver." As for reduction of costs of probation supervision and pre-sentence investigation, the policy provided that if a defendant did not meet the above requirements for fee waiver based on indigency and was employed yet believed he or she was not making sufficient income to pay, that the person could request a financial evaluation to reduce fees. The Department would then apply its written probation-cost sliding scale to determine whether to reduce costs. That scale reflects the set $450 pre-sentence investigation fee and the set $64 per month supervision fee, which, multiplied for a three-year probation period, totals $2,304, as billed to Ladd. As pertinent here, the sliding scale shows that a determination of "monthly discretionary income" of $151 and up will result in no reduction of costs. Costs are reduced on a scale for monthly discretionary income of $150 on down.

[15] The court said, "I see that she . . . borrowed $13,000 to go to college. I stayed collection so she could complete college. She got the benefit of the [electronic monitoring] program, participated in it, and now she's saying through counsel that she doesn't want to pay for it even though she has the ability, apparently, to pay at the rate of $25 a month." The court followed that up by saying, "Let me indicate that we've gone

One of the representatives from the Department of Revenue then testified that in applying the Department's policies, as "long as there is income, [the Department] set[s] up a payment plan, unless [the defendant] falls under the criteria in [the] inability-to-pay procedures." The court queried the witness in response, saying, "You mean you came to the shocking conclusion that if somebody is paying $880 for groceries and utilities and household expenses, and $153 for student loans, and $264 for a car payment, and [$1,250] a month for a house or rent payment, she somehow is generating funds to pay those amounts, then she can probably pay another $25 a month toward court fines and fees?" The witness responded, "Yes."

The witness also said that she did not apply the Department's sliding scale to reduce Ladd's fines but instead set up a $25 per month payment plan, which she considered workable. But she took into account that Ladd was paying her other monthly expenses and that she would "have the ability [to pay] at some time," so that the Department was willing to "work with" her. The witness further confirmed that if costs are still owed when a defendant's probation ends, the obligation is treated as a civil matter and collected as such, i.e, the defendant's non-payment does not constitute a probation violation.

Ladd also testified at the hearing. She confirmed her monthly income and expenses as stated in the two financial forms she had filled out that month, the first submitted to the Department of Revenue on January 9, 2009, and the second Statement of Assets filed just before the hearing. She also recounted her efforts to obtain employment in the legal field, unsuccessful in part because of her criminal record. When asked what sources of income she had other than the $3,360 she had earned in 2008, Ladd asked her

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through the proper procedure in this case. She's been screened administratively. She was given an extra year with no collection efforts and she's now been re-interviewed, and she has the ability to pay $25 a month starting in April [2009]."

lawyer, "Are you asking me as my attorney or my mother? I mean, if . . . you're [asking as] my attorney, then it's my mother. If . . . you['re asking as] my mother, then it's you. I don't know how I should answer that correctly for the record." This response caused the court to ask Ladd's counsel, whom the court then understood to be Ladd's mother, "Does that tell me how all these bills are to be paid?" Counsel responded, "Yes, your Honor." The court asked, "So mom's paid all the bills?" Counsel responded, "Yes, and mom doesn't feel that the [c]ounty should use my ability to pay to collect its sums."

The court then attempted to ascertain actual probation costs when a case is "banked," but could only confirm from a Department of Revenue representative that actual costs would be less than the $64 per month for active probation supervision. The court then attempted to approximate actual probation costs before Ladd's case was banked based on the number of visits Ladd had made to her probation officer and the amount of time spent on each visit plus the drug tests she had taken. The court proceeded to confirm with Ladd the circumstances of her having signed the form on which she had agreed to pay the costs of electronic monitoring and that her mother had paid $790 in costs in case number BB407727 and the bulk of her ongoing living expenses. The court asked Ladd why it was that she could borrow from her mother to pay for all of her other expenses but could not borrow enough to pay $25 a month toward court costs on each case. Ladd replied that none of the money she receives from her mother is borrowed but that it is a gift. Her mother and counsel then offered that maybe Ladd would one day pay the money back and "take care of her in her old age." Her mother further offered that she was then 72 years old and didn't "really want to be working until [she was] 99 or so."

The court then announced that it had read section 1203.1b, which generally deals with probation and related costs, to provide at subdivision (c) for the court's authority to "hold additional hearings during the probationary . . . period" to review a defendant's "financial ability to pay," notwithstanding that the statute also provides at subdivisions

(e)(2) & (3) that "ability to pay" includes a defendant's "[r]easonably discernable future financial position" and "[l]ikelihood that the defendant shall be able to obtain employment" only for a period of one year from the hearing. (§ 1203.1b, subds. (e)(2) & (3).) The court considered itself as having acted within the authority provided at section 1203.1b, subdivision (c) by having previously deferred for just over a year a determination of Ladd's ability to pay probation costs.

The court proceeded, "Previously I stayed all collection efforts . . . on both cases pending [Ladd's] completion of college in the hope that she would be able to retire her court obligations. And at that time, I specifically asked that there be some sort of calculation to determine if her probation fees should be reduced. . . . [¶] I feel, based on the actual formal supervision that she was given, and the fact that her case was banked, that those fees should be reduced." The court then accepted the full probation supervision cost of $64 per month for the eight months that Ladd was on active probation and then added $10 per month for the remaining 28 months of her banked probation term, for a total of $792. The court proceeded to add $108 for the drug tests for a total of $900 and reduced Ladd's probation supervision costs to that amount from $2,304.[16]

The court found, considering all the evidence, that Ladd had "a regular line of credit with her mother," whether that support was loans or gifts. Given Ladd's "ability to obtain gifts, her ability to work and earn money of $3,360 last year, and her ability to borrow money, I think that she does have the ability to pay the reduced probation fees and all the other fees and expenses. And I concur with the Department of Revenue that she has the ability to pay it at the rate of $25 per month [on each case], starting April 1st." In response to Ladd's counsel's inquiry, the court made clear that it was not

[16] Although the court was clear that it was reducing probation supervision fees in both cases to a total of $900, it does not appear that any such fees were charged in case number BB407727.

reducing the $2,160 electronic monitoring fees in case number BB407727 or the $450 pre-sentence investigation fee in case number CC762505, noting that the probation report was not a limited one but a full, comprehensive, 22-page report. The court also confirmed that when Ladd's probation term ended, the remaining costs would become "civil obligations collectible as civil judgments."

Ladd timely appealed, which brings us to the instant appeal.[17]

V. *The Instant Appeal*

Some two months after the court's January 26, 2009 order determining her ability to pay and setting a payment schedule but before Ladd was to make her first payment of $50, she filed a motion to suspend her obligation to pay fines and fees.[18] The basis of the motion was that Ladd had been diagnosed with an eye infection and then mononucleosis in February 2009 and was thus unable to work at all or pay the $50 monthly installment toward fines and fees and her prospects for employment otherwise remained dim. Thus, she contended, she had no ability to pay the monthly installments. Ladd requested the court to suspend its previous payment order until she could obtain "employment demonstrating that she has the ability to pay as set forth by [Department of Revenue] policies and in its calculations concerning amounts of payments to be made based upon [amount] of discretionary income available for payments." Ladd declared by declaration that since the court's January 2009 order, she had been unable to obtain employment, had received no income, and had no prospects for employment at that time. She stated her intentions to resume looking for work once she regained her health and to inform the

[17] As noted, briefing in appeal number H033813 is stayed and we are thus not now in a position to identify what specific issues Ladd intends to raise.

[18] This motion was accordingly not another one to determine her ability to pay, only to temporarily suspend payments due to her then current circumstances.

Department of Revenue when she began to receive "income in excess of the amount [which the Department] considers non-discretionary and available to pay fines and fees."

The motion, which the court considered one to modify probation, was initially set to be heard in April 2009. The probation department submitted a memo recommending that the motion be denied. The court apparently continued the motion and requested Ladd to submit proof regarding her applications for work. In response, Ladd submitted information showing her 2009 to date net earnings to be $1,329.79, a list of 81 employers whom she had contacted since July 2008 for work as a legal assistant or legal secretary, her resume, letters of reference, three letters of rejection, and an updated financial history form, which showed monthly take-home pay of $266 and monthly expenses of $2,733.

At the hearing on June 2, 2009, the court noted that Ladd had many skills but suggested that she attempt to find work outside the legal field, where she might have difficulty because of her record. The court further encouraged Ladd to begin paying her fines and fees so she could "get this behind" her instead of "prolonging [her] own misery." The court observed that there were other people appearing in court that day who had "a lot less talent" yet who manage to pay $50 per month, more than Ladd had paid in two years, a payment record the court called "underwhelming."

At the People's oral request and over Ladd's general objection, the court impliedly denied Ladd's request to suspend monthly payments, and instead extended her term of probation by two years until June 8, 2012, (unless fines and fees were paid off earlier in which case the court said she could seek to terminate probation), and ordered her to begin monthly payments of $25 in each case on June 15, 2009. The court expressed that probation, which was otherwise set to terminate in June 2010, *had* to be extended because, at the ordered rate of payment, Ladd would not pay off fines and fees at the end of her three-year probation term.

Ladd appealed from the order in the instant appeal, primarily challenging her probation term having been extended in this manner.[19]

DISCUSSION

Whether the court procedurally erred by extending Ladd's probation term is governed by section 1203.3, as the power to modify probation includes the power to extend it based on a change in circumstances.[20] (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095; *People v. Medeiros* (1994) 25 Cal.App.4th 1260, 1263.) Our review of this question in this case involves construction and application of the statute to undisputed facts, a task we perform independently and without deference to the trial court's order.

At the outset, we dispense with the People's contention that Ladd waived objection to the court having extended her probation without notice. When the district attorney first orally proposed that the court extend probation at the hearing, Ladd's counsel clearly said, "I object," without stating specific grounds. But the court's response effectively closed the door on any further articulation of the objection. The court said, "Wait a minute, don't interrupt. What is it? Is it going to rain today? Everybody's nervous." After the district attorney reiterated the People's request to

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[19] Ladd also contends in this appeal that at the hearing in June 2009, the court erroneously determined that she had the ability to pay fines and fees at the monthly rate of $25 in each case. As we read the records in this case and the other four involving Ladd of which we have taken judicial notice, the only time the court made an actual ability-to-pay determination was on January 26, 2009. That order is the subject of appeal number H033813, in which briefing has been stayed pursuant to Ladd's request. Her motion heard in June 2009 was only for an order to suspend previously ordered payments for such time until she became employed and earned sufficient income with which to pay. The court denied that request in addition to extending probation.

[20] Ladd urges that section 1203.2 might also apply but we read that section to apply to the modification, revocation, or termination of probation in the circumstance in which a probationer is rearrested while on probation, which did not happen here. And section 1203.3 expressly applies only in cases in which section 1203.2 does not. (§ 1203.3, subd. (e).)

extend probation, Ladd's counsel said, "Your Honor, I object to the—probation isn't even extended for more than a year, there's no need to extend it to five years." Again, the court effectively shut down further discussion by explaining its view that probation had to be extended because fines and fees weren't paid off, concluding, "And that will be the order." There was further colloquy from which it was clear that Ladd objected to the probation term extension for a variety of reasons, none of which held sway with the court. We agree that the People's oral proposal to extend the term of Ladd's probation took her and her counsel by surprise, and further that any other stated objection to the proposal would have been futile under the circumstances. Accordingly, Ladd's objection on appeal that probation should not have been extended without notice to her probation officer is not waived or forfeited by her failure to have articulated this specific objection below.

Proceeding to the merits, section 1203.3, subdivision (a) provides in relevant part that the court "shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." Under section 1203.3, subdivision (b), the court's authority to revoke, modify, or alter the terms of probation is subject to certain conditions. These include that a hearing be held in open court for which the prosecuting attorney shall be given two-days written notice; that the judge shall state the reasons for any modification of sentence or the terms or conditions of probation; and that advance written notice by the court or clerk be given to the "proper probation officer" of the intention to revoke, modify, or change its order. (§ 1203.3, subd. (b)(1) & (2).)

Here, it was the district attorney who made an oral request that probation be extended at the hearing on Ladd's motion to suspend her monthly obligation to pay fines and fees, which would likely constitute a waiver by the prosecuting attorney of the statutory requirement that he or she be provided two days written notice of the court's

intention to modify probation terms. And the court gave as the reason for its action its belief that extending the terms of probation was mandatory because Ladd would not satisfy full payment of fines and fees by the end of her probation term approximately one year later based on a payment schedule of $25 per month in each case.[21] But it is undisputed that no prior written notice of the court's intention to modify probation was given by the court or the clerk to the "proper probation officer" as provided in section 1203.3, subdivision (b)(2). Although the probation department had recommended to the court that it not suspend payments per Ladd's request, no probation officer was notified in advance of the court's intention to extend her probation term—an entirely distinct matter. And the presence in the courtroom of a representative of the probation department does not compensate for the lack of statutory notice as that person was not necessarily the "proper probation officer" as provided in section 1203.2, subdivision (b)(2).

The court accordingly did not comply with this statutory condition of notice to the proper probation officer prior to modifying the terms of Ladd's probation. The proper probation officer, presumably the officer to whom Ladd's case had been assigned, was in a unique position to inform the court regarding its intended action and could have provided an informed recommendation about the intended action, which is the obvious purpose of the required notice. As Ladd points out, at the time of the hearing it does appear that she was then performing satisfactorily on probation, with approximately one year of her term left remaining in case number CC762505. At that time, and with the benefit of statutory notice, her probation officer might well have recommended against

[21] Whether or not the court was correct in this belief may depend on whether payment of each of the remaining fines and fees is a valid condition of probation. This may depend in turn on the application of payments already made as payment of some fines and fees are valid conditions of probation and others are not.

extending her term in case number CC762505 for the full five years, particularly as probation-related costs are not considered conditions of probation. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1068; *People v. Hall* (2002) 103 Cal.App.4th 889, 892; *People v. Hart* (1998) 65 Cal.App.4th 902, 906-907.) Under section 1203.1b, subdivision (d), these costs become collectible as civil obligations and thus can be so collected if unpaid when probation terminates. Moreover, the extension would likely necessitate charging additional probation-supervision fees, an irony given that Ladd has continually asserted that she lacks the ability to pay. And it appears on this record that in case number BB407727, Ladd's probation term, which had a maximum five-year duration under section 1203.1, subdivision (a),[22] was set to expire later that year and could not be extended beyond that.[23] Ladd's probation officer, with proper notice, might well have caught this problematic detail, which seemed to elude everyone else at the hearing. For all these reasons, the court's extension of Ladd's probation term constituted prejudicial error.[24]

We accordingly reverse the court's order extending Ladd's probation terms by two years, until June 8, 2012. The original probation term in case number CC762505 is reinstated and is set to expire on June 8, 2010. On remand, as to case number BB407727,

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[22] Under sections 484/666, a conviction for petty theft with a prior may be punishable by a state prison sentence. Under section 18, that sentence may be 16 months or two or three years. Consequently, under section 1203.1, subdivision (a), the maximum allowable probation term for this offense is five years.

[23] The five-year term may have been tolled for some period under section 1203.2, subdivision (a). It is difficult to tell for how long based on the record before us.

[24] Our conclusion obviates the need to address Ladd's alternate argument that even if the court had the authority to extend probation as it did, to have done so was an abuse of discretion under the circumstances because, she contends, the remaining payments were not conditions of probation and the court acted prematurely with a year still remaining on her previously existing term.

the court is to determine the expiration date of the probation term, as the record is ambiguous on this point. The court is free to consider whether a modification of probation in either case is warranted, including by extension of the term, as long as the court retains jurisdiction to do so, timely acts, and does so in accordance with the provisions of section 1203.3.

DISPOSITION

The order extending the terms of Ladd's probation until June 8, 2012, is reversed.

Duffy, J.

WE CONCUR:

Mihara, Acting P.J.

McAdams, J.